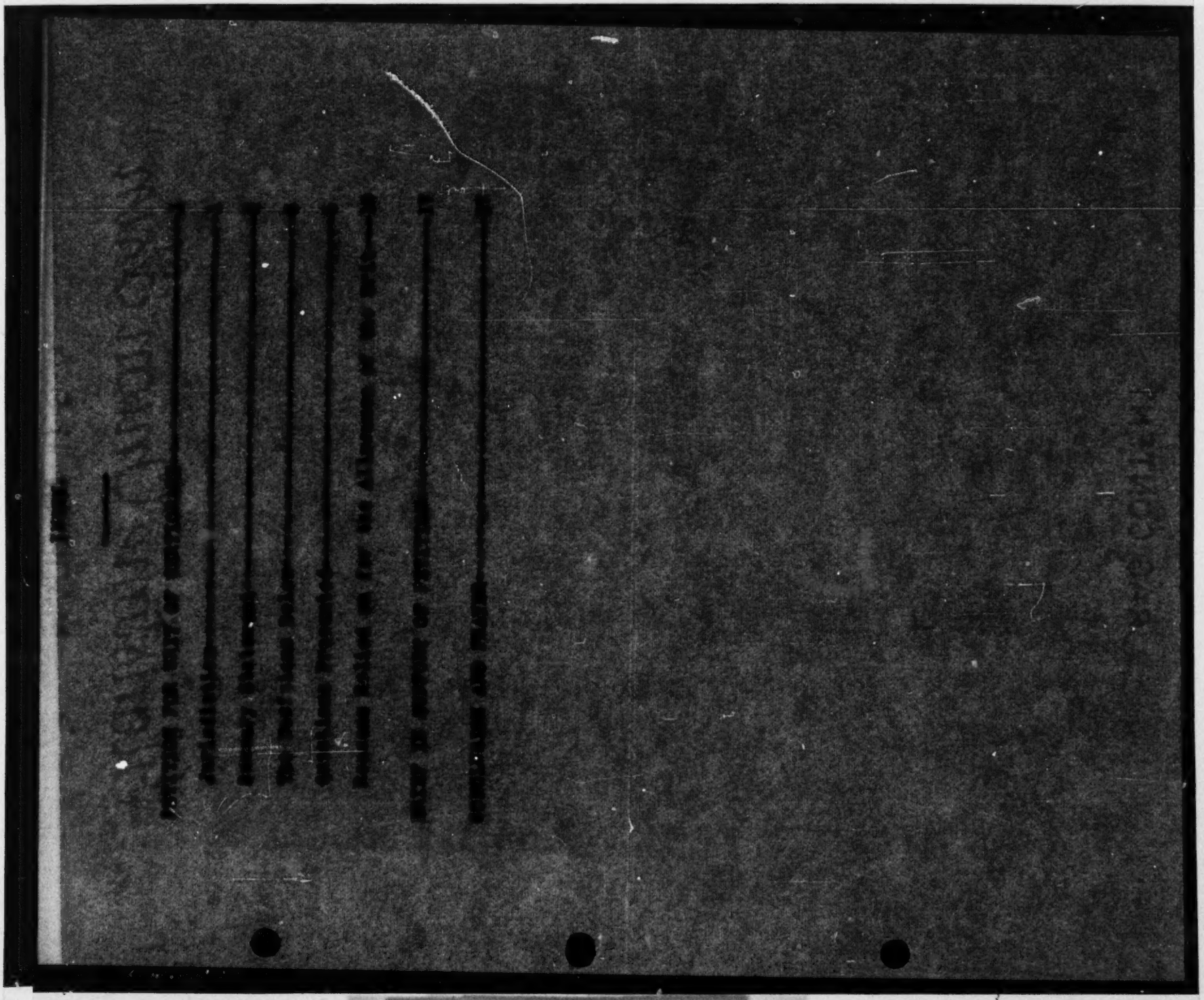

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TABLE OF AUTHORITIES.

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Shadow Creek Ranch
MADE IN USA
RAGE CONTENT

IN THE SUPREME COURT OF THE UNITED STATES

No.....

October Term, 1958

THERWOLD REPSHOLDT,

Petitioner,

vs

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States.

Petitioner, Therwold Repsholdt, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit rendered July 17, 1958, reversing a decree in Admiralty of the District Court for the Northern District of Illinois, Eastern Division, filed on February 13, 1953, in favor of the petitioner.

JURISDICTION

Jurisdiction is based on 28 U.S.C.A. Sec. 1254 (1).

The decision below was entered July 17, 1958; the amendment to the decision and the denial of the petition for rehearing was entered on September 8, 1958.

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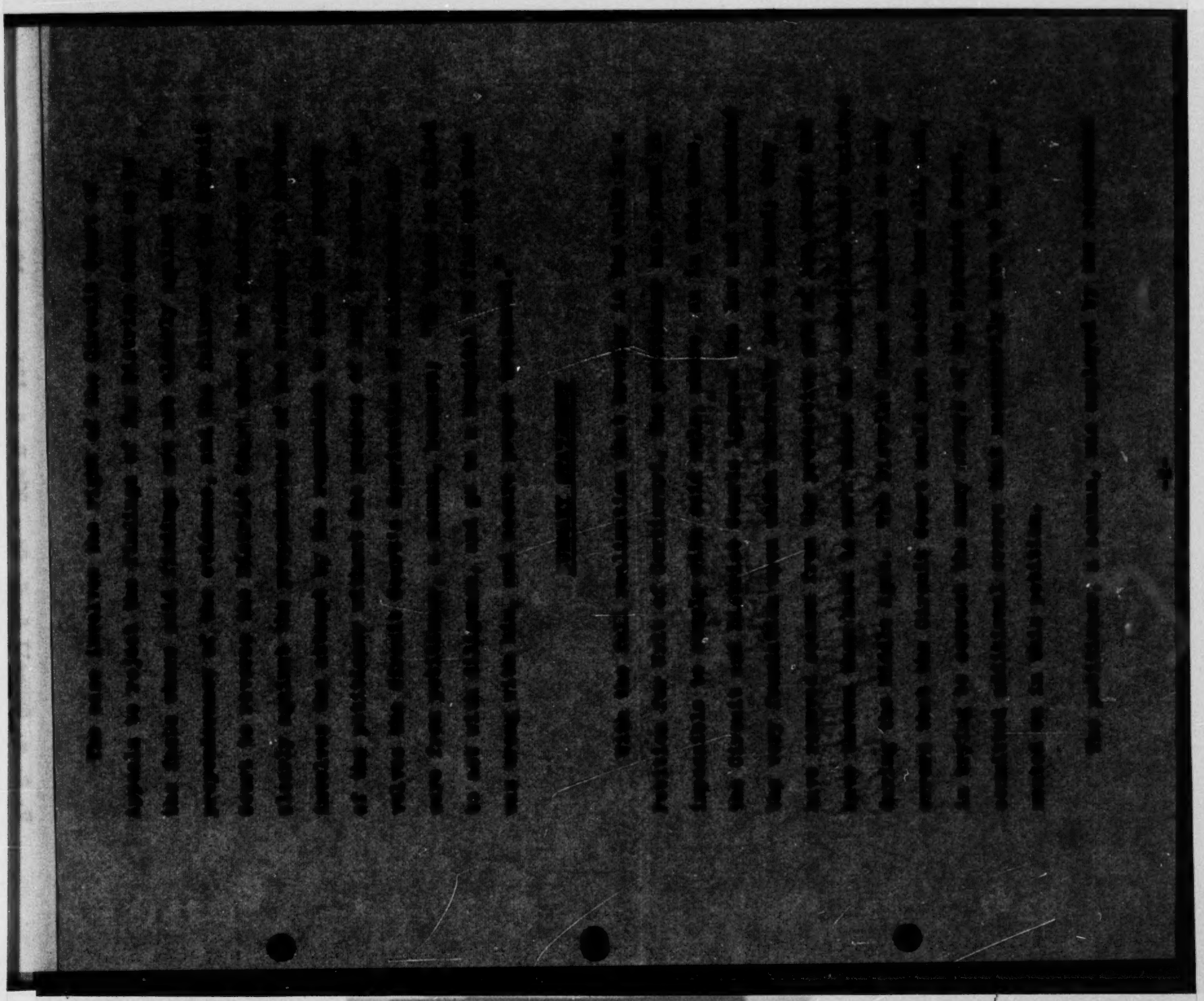

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on one of its vessels during the year 1948; he was injured in the course of his employment by reason of the negligence of the respondent.

Petitioner filed a suit on November 21, 1949, under the Jones Act and Admiralty Act to recover for his injuries; said suit was called for trial on June 29, 1950; on December 8, 1950, the District Court rendered its opinion, finding the issues in favor of the petitioner. On February 13, 1951, the court entered its findings of fact and conclusions of law. An appeal was prosecuted to the Circuit Court by the respondent because of the errors of the District Court.

[illegible]

The opinion of the District Court said:

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

falling to close the porthole..."

"The evidence is insufficient to show any causal connection between the fall and injury which occurred aboard the [illegible], Fort Stephenson, and the fall which occurred on April 15, 1949, or the fall which occurred in February, 1951."

The opinion of the Circuit Court stated, among other things:

"The District Court found that 'the evidence is insufficient to show any causal connection between the fall and injury which occurred aboard the [illegible] and the fall which occurred on April 15, 1949, or February, 1951.'

"We think the record warrants that finding."

"As we have indicated, libellant's story was very vague and contradictory in many respects..."

"With respect to libellant's claims (1) that there was no [illegible] in the cabin which he occupied... (2) that he was not warned that the [illegible] was [illegible], we are convinced that these claims have no pertinency to the question of the proximate cause of his injury..."

"If the porthole cover had been closed and fastened, there would have been no flooding of the cabin floor, and if the cabin had not been flooded, the libellant would not have been injured as he was. The duty to close the porthole in his cabin devolved upon the libellant."

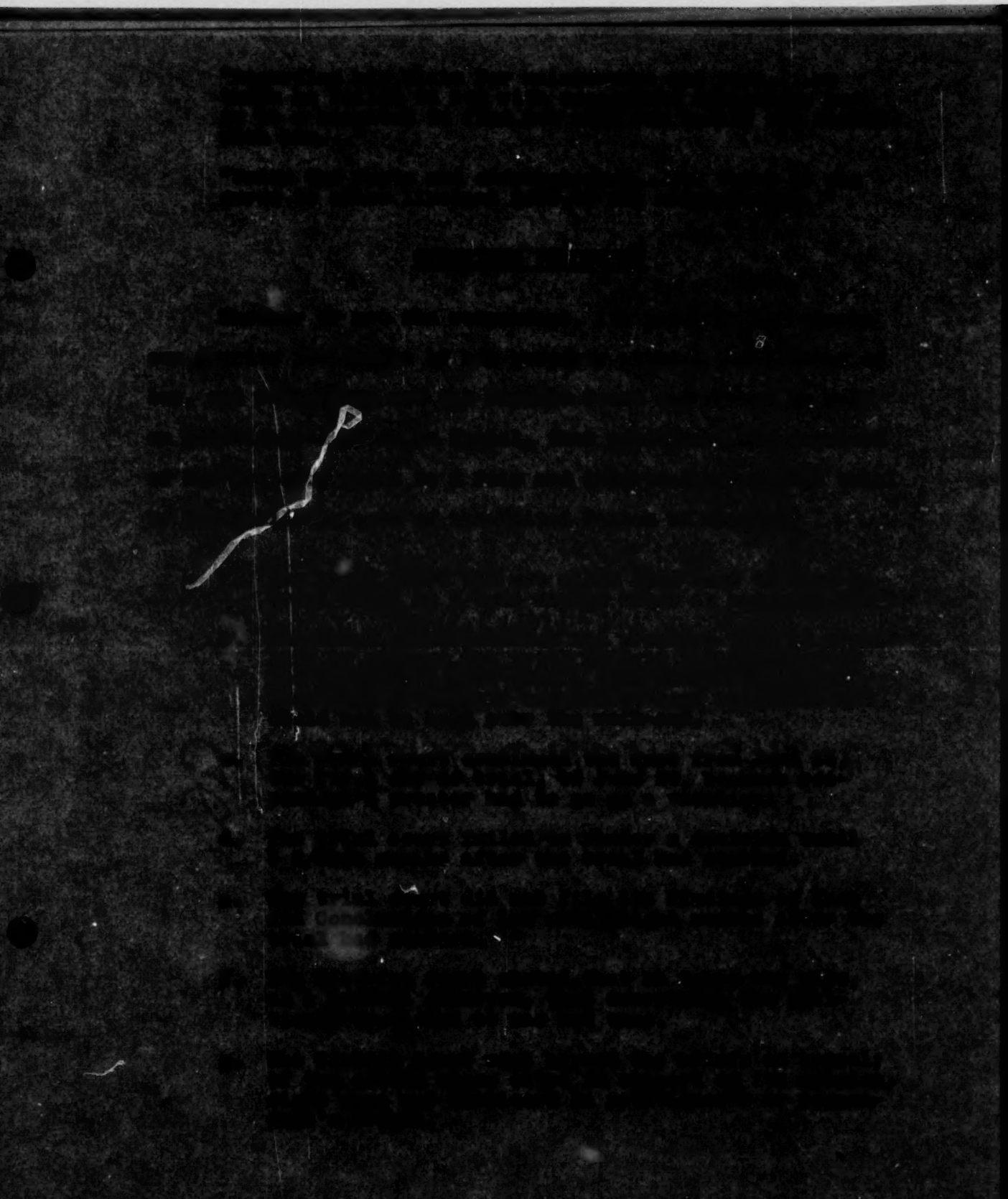
"Even though warnings may be required by law [illegible] a [illegible] absence was not the proximate cause of libellant's falls and injury..."

"The record is barren of proof of negligence..."

"There is nothing, so far as we can see, that involves [illegible] only 'the obvious and well-known risks of the [illegible].' There [illegible] is no evidence of negligence in law."

"Other errors relied upon have been considered and we find they lack merit."

The court further decided that petitioner did not seek "medical aid or attention for 42 days after it occurred", (page [illegible] of decision).



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Whether or not the Circuit and District Courts can find that there was no duty upon the officers of a vessel to warn of an approaching storm and to order the evening of the vessel upon the clear preponderance of the evidence is that it was the duty of the officers to order the evening of the vessel upon approaching a storm area?

Whether or not the Circuit Court can find that petitioner's injury and the result of the "evident and well-known risks of the business" upon said injury was caused by the respondent's negligent violation of a statute enacted for the benefit, health, and safety of seamen?

Whether or not the Circuit and District Courts can consider, in deciding this case, the representations of petitioner by reading such paragraphs "Second" and "Third" from medical records which were never admitted upon evidence and which were brought into Court by the stipulation of the proctors for the parties hereto, and then splitted away after their use as cross-examining, and before petitioner had a chance to examine them for errors and omissions and alterations?

Whether or not the Circuit Court can find that the sole cause of the flooding of petitioner's cabin (said flooding being the cause of his injury) was the open portside then the following are the facts:

a. The District Court made a finding of fact that the open portside and the lack of dunnage was the cause of the flooding.

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b. The clear preponderance of the evidence is that it was the duty of the officers to order the mooring of the vessel prior to a storm.

c. The clear preponderance of the evidence is that it was the duty of the Master to secure the vessel.

d. The District Court found that "scuppers or drains in a cabin are required by law". (46 USCA 260-61).

e. The violation of the aforesaid statute is negligence as a matter of law.

f. There is no proof that petitioner left the portholes open.

Whether or not the Circuit Court can consider as competent evidence, in its opinion, the testimony of the U.S. Public Health doctor at Milwaukee who testified that petitioner did not go there for medical treatment, when respondent impeached said doctor, by admitting in its brief that petitioner "must have been there"?

Whether or not the Circuit Court can reverse the District Court's Finding of Fact that petitioner was entitled to maintenance and cure, when said Finding, except as to the amount of maintenance, is supported by the clear preponderance of the evidence, and, when there is no Finding that petitioner was guilty of gross negligence causing his own injury. Whether or not the Circuit Court can refuse maintenance and cure to petitioner because it found, contrary to the clear preponderance of the evidence, that he did not use "reasonable diligence"?

Whether or not the Circuit Court can reverse the District Court's Finding of Fact by finding that petitioner's injury was

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the result of the "obvious and well-known risks of the work-man"?

Whether or not the Circuit and District Courts may ignore the uncontradicted testimony of the U.S. Public Health doctor, Dr. Cornelio, and ignore the clear preponderance of the evidence in deciding that there was no causal connection between the various injuries of the petitioner? Can the Circuit Court ignore the law in holding that there was no causal connection between said injuries?

Whether or not the Circuit Court can refuse and fail to rule on petitioner's point on appeal that the District Court erred in failing to order the production of respondent's medical reports and witness statements on motion being made prior to trial?

Whether or not the Circuit Court can ignore and refuse to rule on petitioner's point raised on appeal, that the District Court erred in failing to find that respondent's failure to produce available testimony and evidence raised the presumption that said evidence would be unfavorable to it?

Whether or not the Circuit Court can allow respondent the right to a cross-appeal when the respondent had failed to file any exceptions in the lower court?

Whether or not the Circuit and District Courts can allow respondent's depositions to be made a part of the record on appeal after said appeal had been perfected, and when respon-

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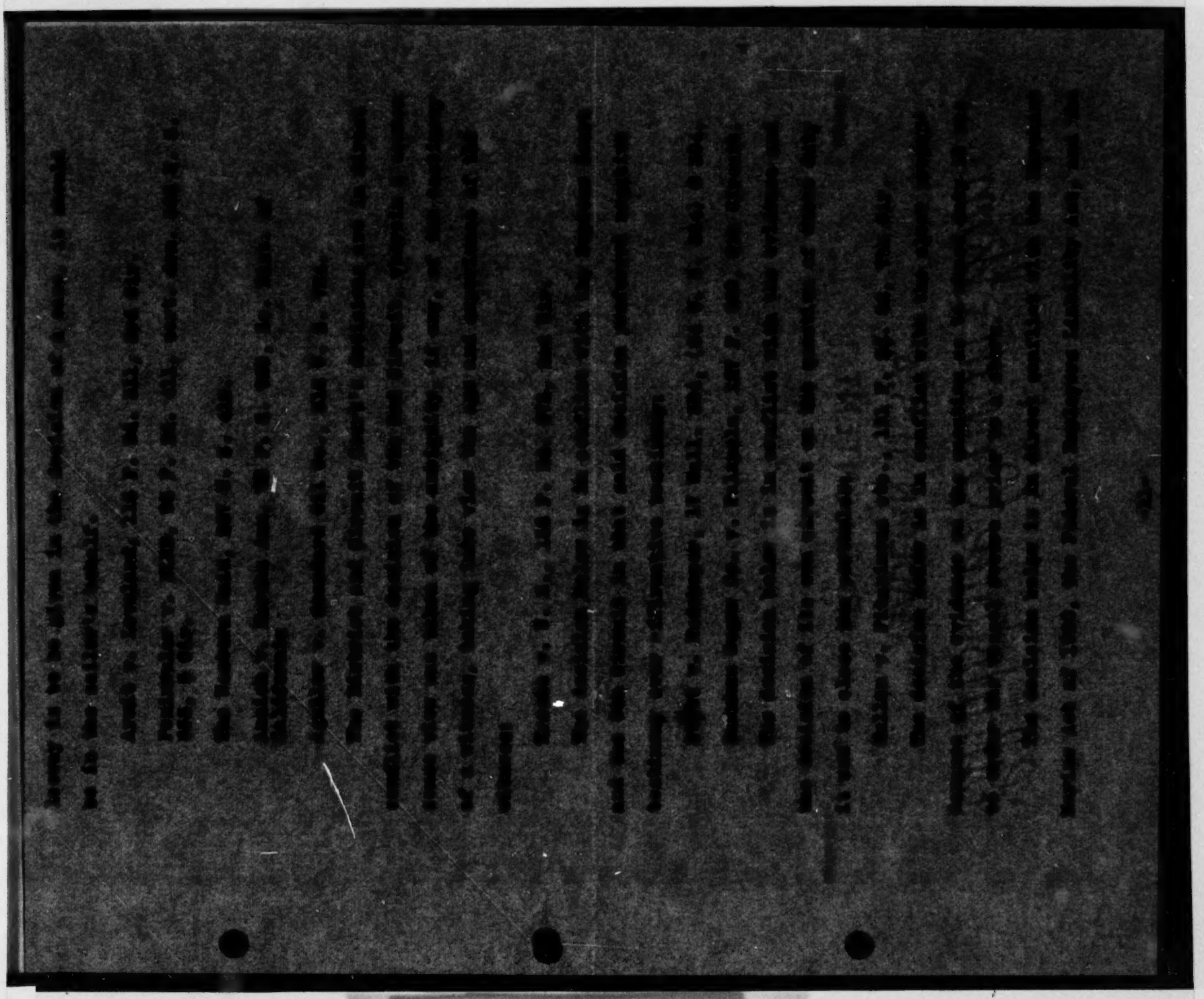

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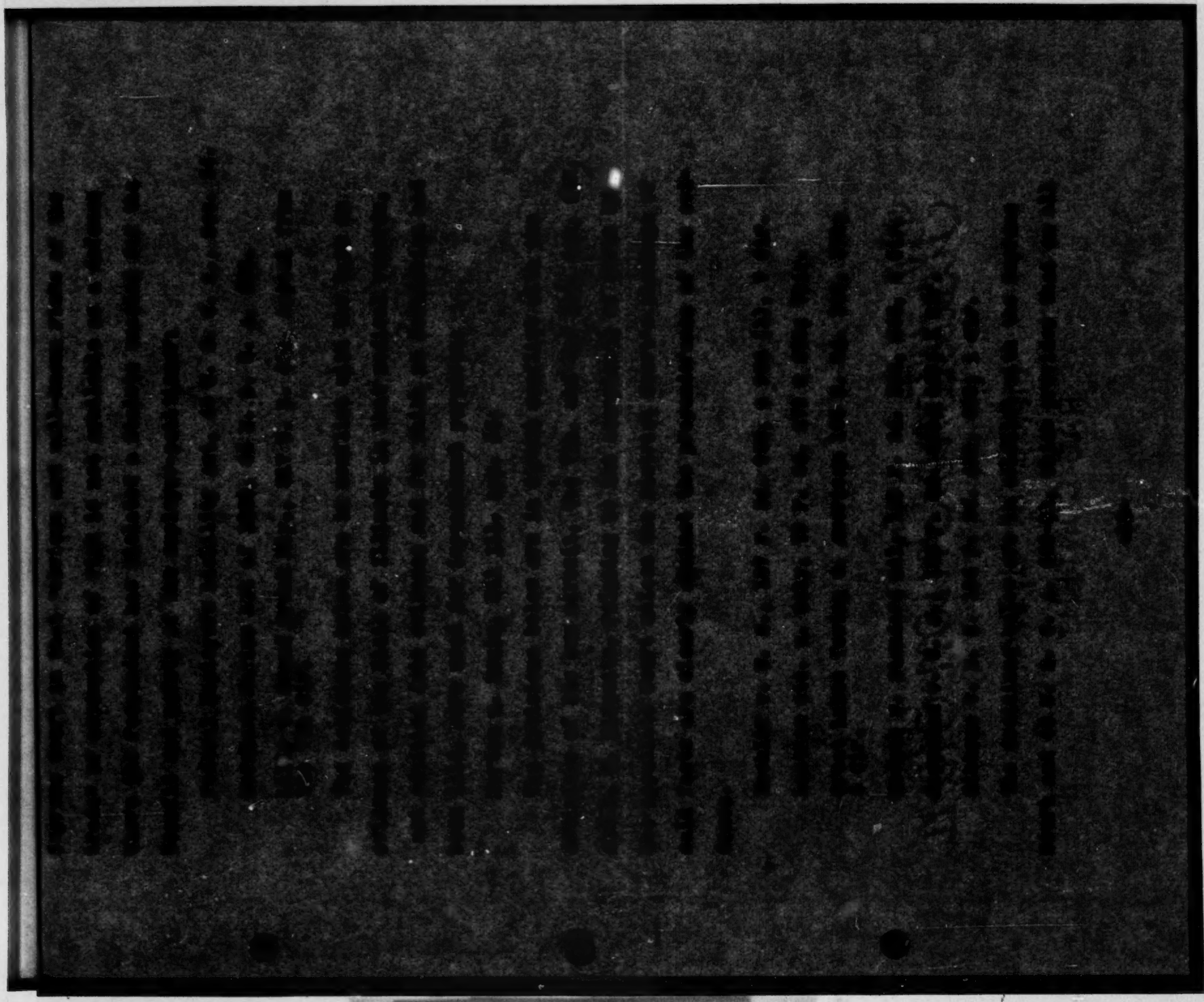

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Brown v. Maryland, 25 U. St. 159; 6 Cir.

Tenney on Preliminary Inc. 185.

The decision below is in conflict with the decisions of the 5th, 6th and 2nd Circuits which hold that there is no right to an appeal or cross-appeal if objections or exceptions are not raised in the lower court.

Aggarwal v. Ponnapula, 527 F. 2d 1011, 1015; 5 Cir.

Bankston v. Pittsburgh, 169 F. 2d 466; 5 Cir.

Pendleton v. Pearce, 10 F. 2d 609; 2 Cir.

L. Stern v. White, 844 F. 2d 1294; 9 Cir.

Right v. Breuer, 308 F. 2d 879; 9 Cir.

Wa J. Lustig v. Commissioner, 369 F. 2d 553; 5 Cir.

The decision below is in conflict with the decision of the 5th Circuit in that the District Court allowed supplemental depositions to be made a part of the record on cross-appeal even though the appeal was not filed in the District Court and even though respondent had failed to designate them in the praecipe for record, and even though the District Court had lost jurisdiction by reason of the appeal.

Rexford v. Brunswick, 332 F. 2d 1000; 5 Cir.

The respondent, The United States of America, has attempted to take the property of the petitioner without due process of law.

The decision of the Eleventh Court of Appeals for the Seventh Circuit resulted from a misapprehension of the facts and the law as set out in all of the above-cited cases.

The Eleventh Court has so far departed from the usual and accepted course of judicial proceedings and has sanctioned

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such a departure by the lower courts, as to call for an exercise of this court's power of supervision.

The questions presented are of general public importance if this nation's maritime service is going to survive and this nation to maintain its strength.

The decisions of the courts below tend to result greatly inequitable to the rights and privileges of seamen.

The courts below have decided important questions of local law in a way in conflict with applicable local law.

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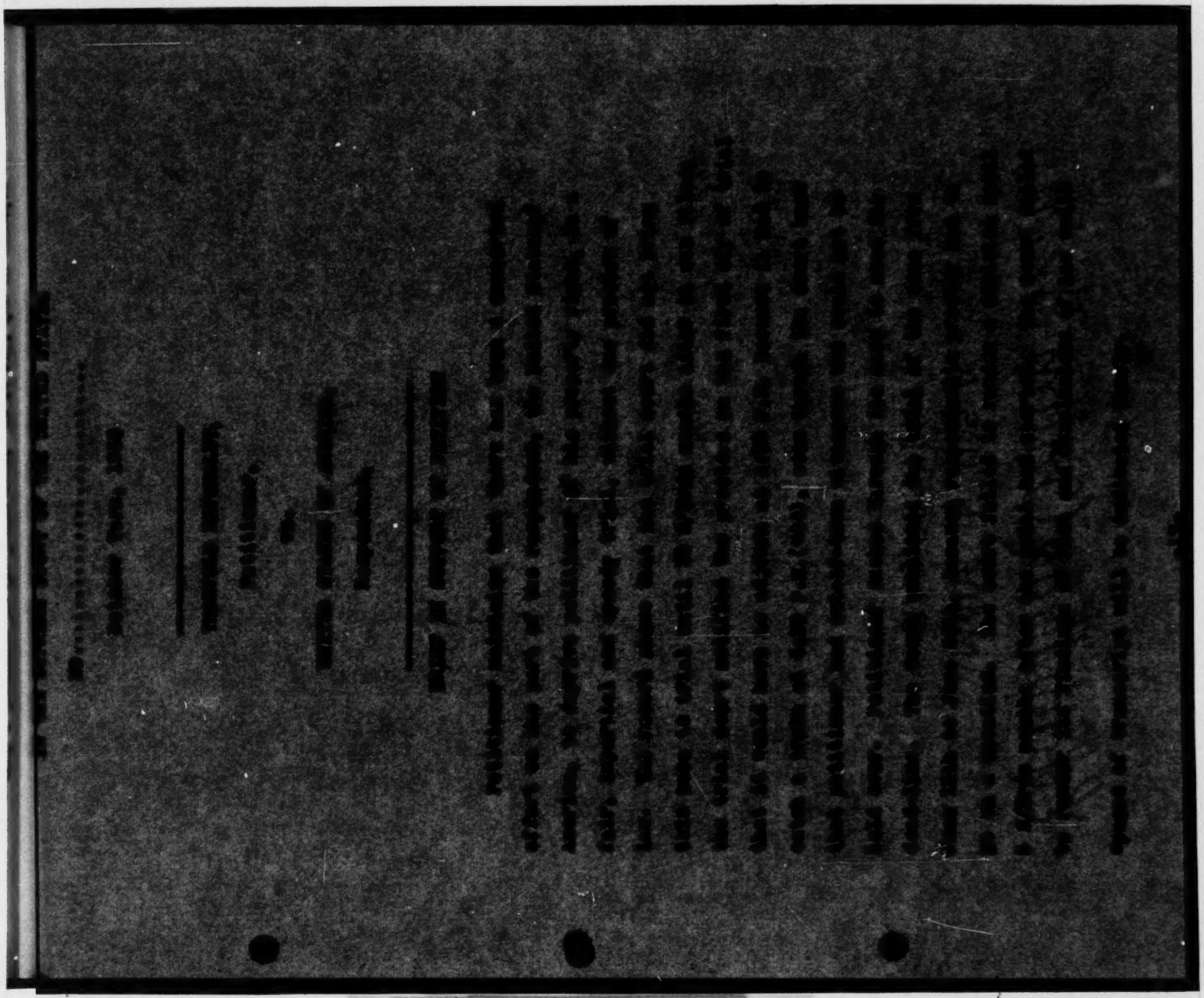

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[redacted] eight months after his trial had started. The trial court made a statement in open court that he "knew the view, as a matter of record, that everything [the judge] considered in the 4th trial [transcript of testimony of February 5th, 1968, p. 5, under F of respondent's brief filed in the Circuit Court]. The trial court made no many errors that the Circuit Court could do nothing except make the decision here on appeal, thereby committing additional errors. In committing the errors, the Circuit Court went beyond the briefs in deciding this case. If the eleven citations in the decision, eight were not cited in any of the briefs. By going outside the briefs, petitioner was not given an opportunity to analyze them to see if they were relevant and material to the issues, nor was he allowed to argue the merits of those cases prior to the decision. It is maintained that such a practice, excessively done, is the same as depriving one of the right to cross-examination, or, he must not be entirely brought up by way of answer or reply.

This is best illustrated by the Circuit Court's use of Bowers v. Ames Shipping Co., 345 F. 2d. 952, 954, in support of its contention that the failure to use reasonable diligence and go to a hospital will deprive a seaman of maintenance and cure. A reading of that case shows that such decision is based upon three citations, some of which proposed such a new theory:

> The Dauntless, 318 F. 2d. 382, 383. Plaintiff left the hospital without permission and was discharged from another hospital because of disorderly. A 422 A seaman can not obtain an award for maintenance and cure where he has declined hospital treatment."

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[illegible] v. Bell's Automobile Co., 20 F. 2d. 282; Hutchinson was disinclined because he was afford hospital treatment and declined it.

Arndt v. Loveland 20 F. 2. 438, 439; "After a tender and refusal of proper maintenance and care, a woman can no longer hold her employer therefor."

The latter three cases are based upon the rule of [illegible] law that a woman is grossly negligent in aggravating her own injury and is guilty of wilful misconduct in failing to accept proffered medical treatment. The decision in the Reeves case has no foundation in law. Such a decision is allowed to stand as the basis for many recovery plaintiff has [illegible] funds to appeal plaintiff's attorney has not had the [illegible] an appeal to the Supreme Court, an amendment was brought in under and many number of reasons. It is now up to this court to rectify the error in the lower and highest courts.

Aside from the foregoing, some of these cases have a similar factual situation. Your petitioner was not offered medical aid, and he sought medical aid within a week after the injury.

The attention of the Supreme Court is called to the opinion made a part of this record. The first paragraph of the original opinion stated that this entire action was not under the Federal Act. When the Circuit Court was again informed, in petitioner's petition for rehearing, that this suit was under the Suits in Admiralty Act, the court amended its opinion. Instead of just making the amendment a part of the record, the amendment was affixed over the original paragraph one, of the original opinion, thereby obliterating the original paragraph from the

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court's view. It is maintained that this is not the usual and accepted course of judicial proceedings, and, when taken with the past method of proceedings, casts a shadow upon the opinion and method of trial and appeal of this case.

This court is asked to keep the aforesaid facts in mind, (and especially the fact that petitioner was put to the additional burden of proving his case beyond a preponderance of the evidence in order to overcome the courts ruling) before he could come in the even best required in the court of a fair and impartial trial); only thereof state could pass the findings of fact and decisions here on appeal.

"The process of law does apply to the prevention of a denial in a court of record, ordinarily means to secure that a timely and regular proceeding is a judicial and execution." Bright v. Williams, 4 F2d. cases 24,218.

"Due process requires an orderly proceeding in a judicial court adapted to the nature of the case. The trial must be a fair one." 12 Corp. Jur., page 1008.

"Sec. 14. Whenever any district judge is unable, because of the accumulation of urgency of business in which he is to perform speedily the work of his district, the senior circuit judge of that circuit... shall designate and assign any district judge of any district court within the same judicial circuit to act as district judge in such district..." Revised Rules of the Supreme Court of the United States; page 14.

"The responsibility for delays, adjournments, and other proceedings must therefore rest upon the trial judge. He cannot be held derelict, except over a period of time, in the matter of a trial which ought not to have dismissed him duty is an abuse of judicial discretion... calling counsel in overlooked." 166 Fla. City, 134 S. So. 2d.

The court has accepted to file [illegible] upon the petitioner with no regard for his rights as a person.

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In addition to the aforesaid, the apparent facts are that the United States is the respondent. The U. S. District Attorneys assisted in the defense of the case the U. S. District Court and the U. S. Circuit Court and in judgment on the case. The Circuit Judges going beyond the briefs in this case in support of their decision, attempted to hide the error in his opinion by placing some behind an assistant, contrary to any known rule of procedure.

In addition thereto the following events occurred. The U. S. Veteran's Administration Hospital records were used in an attempt to impeach the testimony of the petitioner. Petitioner's attorney had stipulated with respondent's attorney that said records could be admitted into evidence on behalf of both sides (49 and 50), but, after respondent's proctor had read them to "himself and his self" (50), in reading from said records, instead of quoting Dunphrey, an ex-pugilist, he returned them to the Veteran's Hospital at Tomah, Wisconsin before petitioner's proctor could examine them for alterations, additions, etc., or could submit any material matter on behalf of petitioner (72). Both records were large affidavit log evidence by respondent, and petitioner never had a chance to go after them. The entire examination made of petitioner by the United States before he was allowed to testify in the cause was missing (94, 108 and 104). The U. S. Public Health records at Milwaukee were, or were not! (97), missing. The log book of the U. S. vessel testified to many mentioning petitioner's injury. The doctor the combined petitioner prior to trial did not testify. The District and Circuit Courts, instead of

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considering these irregularities in their true light, that is, the failure to produce testimony and evidence, militates against the party possessed of said evidence, used them as impeaching evidence against the petitioner.

> "It is also to be observed that, evidence was [illegible] possession of the government, [illegible] it was not produced. Since it was not produced the presumption is that its production would have constituted evidence unfavorable to the respondent; and in such a case, the court is justified in concluding that the proof if produced offered, instead of rebutting, would sustain the case against the government." [illegible] 87 F. 2d 235, 6 Cir.; Henderson v. Richardson, 88 F. 2d 685, 4 Cir.; [illegible] v. U. S. 138 F. 2d 213, 9 Cir.

Then the United States doctor from the Veteran's Administration Hospital, Dr. [illegible], testified that in his opinion there was a causal connection between the injury aboard ship and the subsequent injuries, the courts ignored his testimony completely. The courts ignored the testimony of the petitioner's eyewitness, Mr. [illegible].

A combination of all of the foregoing is indicative of respondent's attempt to take petitioner's property right without due process of law, contrary to the 5th Amendment to the Constitution of the United States: "No person shall...be deprived of...property, without due process of law..."

The decision of the District and Circuit Courts is in conflict with the decisions of all of the Circuits and of the Supreme Court in that it ignores the duty as guardian of the seafaring man:

> "It has long been recognized that the admiralty courts in the administration of justice deal liberally with seamen. Seamen are special wards of admiralty because

of the nature of their service and its accompanying dangers. The maritime courts, having jurisdiction over seamen, have for generations made every effort to protect their rights and interests. Admiralty rules and pleadings are to be liberally construed and in dealing with seaman's rights, admiralty will grant justice where equity and expediency are joined. While Admiralty Court does not have general equitable jurisdiction, it acts upon equitable principles and should give relief where a court of equity would relieve and a court of law will not.' Antich v. Marsha Ann, 98 F. S. 930; The Western Maid, 257 U. S. 419; Manley v. Sinpre S. S. Co., 49 F. S. 108 (Cir.ail); Waite v. Santos, 114 U. S. 555; W. S. v. Cornell S. B. Co., 302 U. S. 184.

The lower courts make no pretense of guarding the seaman's rights. It is difficult to control one's pen in writing this petition in the light of the court's total failure to comprehend its duty toward the suffering man, as shown in every paragraph of their decisions and findings.

The decisions below are diametrical with the Supreme Court and all of the Circuits in deciding the issues in an Admiralty case against a seaman, where the clear preponderance of the evidence is in favor of the seaman:

> "The rules of common law respecting proof of the employer's negligence shall not be visited too rigorously upon the seaman. A higher degree of care is required of the employer of seamen than is required of servants who work on shore." Arnold v. Loveland, 116 F. 2d. 511, 2 Cir.
>
> "The owners of vessels...are required to exercise the highest degree of care and skill for the preservation of the lives of the crew...This duty is superior to all other considerations in the operations of the ships." Pennsylvania v. Erie, 98 F. 2d. 411, cert. den., 305 U. S. 625, 2 Cir.
>
> "It has long been recognized that the Admiralty courts in the administration of justice, deal liberally with seamen. Seamen are special wards of Admiralty because of the nature of their service and its accompanying dangers. The Maritime Courts, having jurisdiction over seamen, have for generations made every effort

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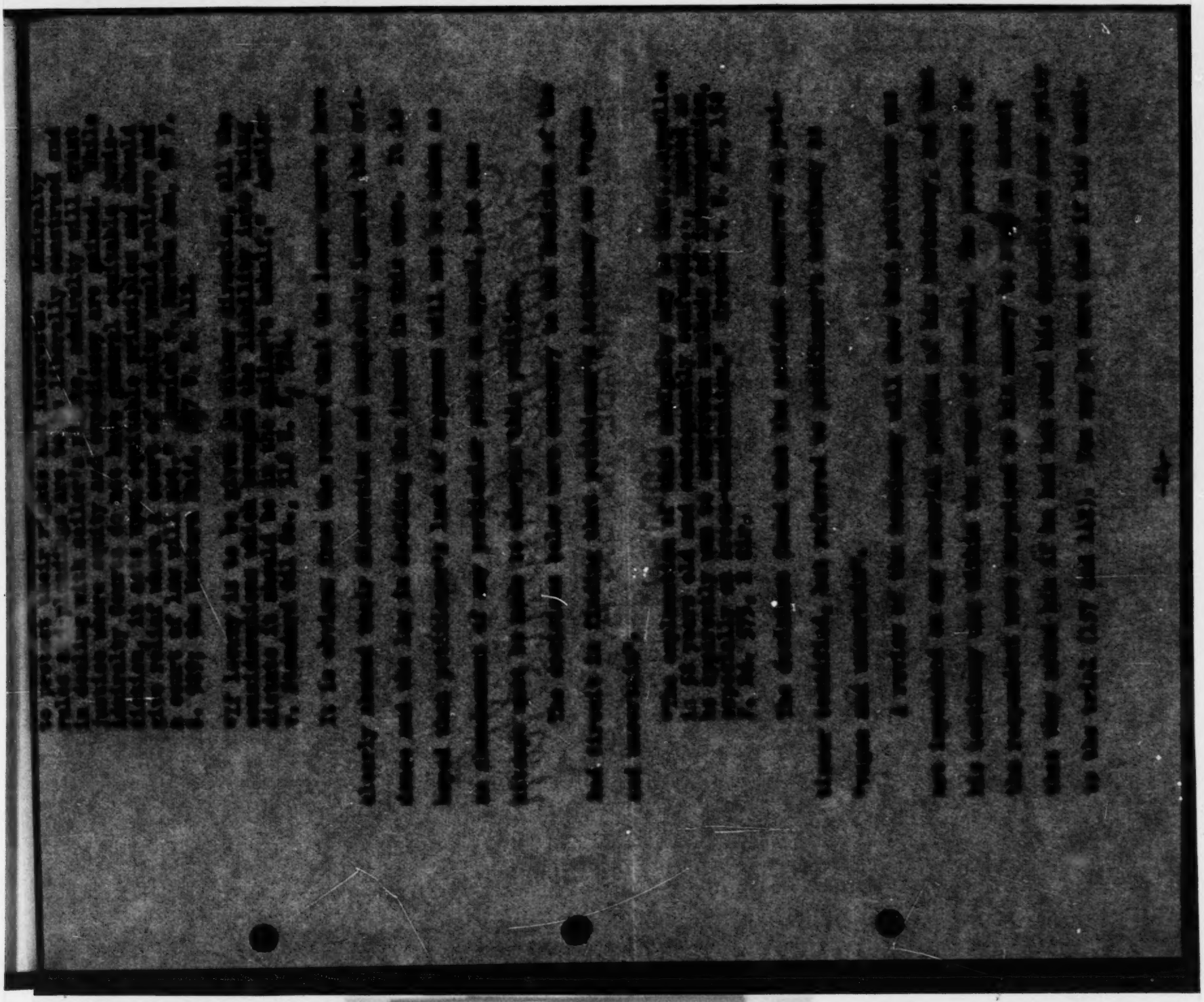

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[illegible] may had been [illegible] by fact given on his deposition, the respondent would argue that he exercised it, and therefore, his testimony was of no value.

The decision of the lower court was contrary to the decisions of the Supreme Court and the 7th Circuit in that it preferred negative testimony to affirmative testimony:

> "That it is the rule of presumption that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten." Pilot v. Middleton, 17 Wall. 684; Hampton Sugar Co. v. Pelaghi, 127 F. 980, 9 Cir.

A review of the testimony for the respondent will show that respondent's witnesses did not say this, or did not find that there is little or no positive testimony. Petitioner presented an eyewitness to the injury and to his subsequent ill-being; and an affirmative witness regarding the actual connection between his injuries. The decision showed that negative testimony was preferred over positive testimony.

The decision below was contrary to the law and the evidence; it was contrary to the law stated by this same Seventh Circuit wherein it was stated:

> "A plumbing order should not keep required the defendant to clean up the bag in heavy weather. Plaintiff was told about the plumbing order and testified it was his job as declared to do that." Keller v. Fitzsimons, 101 F. 2d. 88.

The Circuit Court in the Keller case found that it was the duty of the petitioner, a tenant, to clean up the vessel, even though he spent very little time in his quarters (88). Petitioner and his witnesses testified that it was the duty of the deckhand to clean up the vessel (107 and 140). Respon-

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Smith's other witness, Mr. Thomas, testified that he would never use portables upon after a storm, but he would not order them placed under or a storm. (respondent's depositions pages 16, 26, and 27).

The decision below was contrary to the decisions of the Supreme Court in holding that respondent was not liable because the injury was the result of the "obvious and well-known risks of the business"..."and heavy rain"; this was said after the court had held that the flooded condition of the room caused petitioner's injury. Assumption of risk is no defense to this claim:

> "The act, like the Safety Appliance Act, is to be liberally construed in the light of its prime purpose, the protection of the employee and others by requiring the use of safe equipment."

In discussing a rule: "Use of water...shall be kept clean, and racks provided to carry off waste water", the Supreme Court said:

> "...we think it was aimed at requiring the use of the sanitary or at least foreign matter which would render footing insecure, for example...waste water...". "In using the word 'clean', the Commission must have meant ...the continuing duty to promote the safety of employees by removing from the top of the water all substances which might make standing there hazardous." "Since petitioner's injuries were the result of respondent's violation of the Boiler Inspection Act, the partial defense of contributory negligence and the bar of assumption of risk are not available to the respondent." Lilly v. Grand Trunk Ry., 317 U. S. 481; Fed. Empl. Lia. Act, Sec. 54; Movement Marine Act of 1920, Sec. 688.

The Trial and Circuit Courts allowed their decisions to be affected by certain questions asked by respondent on the cross-examination of petitioner; said questions were based upon

the contents of the medical records of the Veterans Administration Hospital at Wood, Wisconsin; prior to trial it had been stipulated by both sides that said records would be admitted into evidence on behalf of both sides (48-50). But, respondent, in reading from said records, in the cross-examination of petitioner, did not quote them; he read what he "thinks it says here" (55). After their use on cross-examination, the respondent retrieved said records from the courtroom, before petitioner could examine them for alterations, etc., and before petitioner could use them on rebuttal to inquire as to the circumstances surrounding the making of said records, (79).

Judge Campbell, of the U. S. District Court of the Northern District of Illinois issued for publication, in a case where the United States removed a witness from the jurisdiction of the court:

> "The procedure was highly irregular....What kind of police state tactics are these.... It was a deliberate and vicious trick and this court was denied a certain privilege. I don't like these tactics being used." Page 2, Part 2, Chicago Daily Tribune, September 22, 1953.

Respondent did not offer said records into evidence, because it knew that it could not do so without complying with the Illinois law which requires testimony relative to the circumstances under which said records were made. But the Tenth Court took respondent's "thoughts as to what they contain", as facts, caused them in its decision

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"In action for personal injuries, permitting defendant during his case in chief to read for the purposes of impeachment portions of a written statement which plaintiff had allegedly given to an investigator was prejudicial against the plaintiff where the investigator was not produced as a witness to testify as to the circumstances under which statement was taken or as to whether it was in the same condition as when taken." Norton v. [illegible], 341 Ill. App. [illegible].

This decision is in conflict with the decisions of the Supreme Court and the 7th Circuit in that it reversed the District Court on findings of fact that were supported by a preponderance of the evidence and affirmed the District Court on findings that were clearly against the preponderance of the evidence.

"The findings of the District Court as to the facts will be accepted by the Circuit Court unless clearly against the preponderance of the evidence." [illegible] v. U. S. [illegible] F. 2d [illegible]; [illegible] v. [illegible] [illegible] F. 2d [illegible]; [illegible] v. U. S.

The District Court had the burden of determining whether the open porthole was the sole cause of the flooding of petitioner's cabin, or, whether the lack of proper drainage was the sole cause of the flooding of petitioner's cabin or, whether a combination of the open porthole and lack of drains caused the flooding of the cabin. The District and Circuit Courts agreed that the flooded cabin was the cause of petitioner's injury. The District Court found that the open porthole plus the lack of drains was the cause of the flooding. The Circuit Court found that the open porthole was the sole cause of the flooding.

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[illegible] the lack of proper driving "have no relevancy to the question..." The District Court reversed the District Court on a finding of fact that was based on the preponderance of the evidence.

The District Court found that "everyone on driving in a subdivision...are regulated by law [(40 Penn Laws)]". That failure to have driving in violation of said statute was negligence as a matter of law:

> "Violation of a statute each of which by its terms is designed [illegible] negligence as a matter of law." Kenney v. Heller, 2 N. Y. 2d 37, 39, 156 N. Y. S. 2d 377, 378, 137 N. E. 2d 1.

The Circuit Court reversed the District Court and said: "The [illegible] in this case failed to prove a [illegible] (of proving negligence)." The fact is at most, [illegible] from the evidence and the jury was [illegible] of going contributory to the Plaintiff condition that caused the injury. It is to be quite candid here, that contributory negligence is not a defense where the Defendant violated a statute as in the [illegible] case, supra.

The testimony of petitioner (P) and his attorney (DPA) disclosed that it was the duty of the Defendant to [illegible] the record [illegible]. Consequently, [illegible] testified that it was not the duty of the Defendant to [illegible] the [illegible] and [illegible] that after [illegible] he would go around the record and call attention to the fact that the [illegible] were closed, as they could be

reopened (Deposition 18). Respondent's other witness, Sorenius, testified that he issued orders to check all watertight bulkheads and doors, conveniently omitting portholes, (Deposition 85 and 87). This same Circuit Court has held it the duty of a deckhand to secure a vessel prior to a storm:

> "A standing order aboard the Roche required the deckhand to close up the tug in heavy weather. Plaintiff was told about the standing order, and also testified it was his job as deckhand to do that." Mullen v. Fitzsimons, 191 F. 2d. 82, 7 Cir., Judge Finnegan.

The opinion is clearly against the preponderance of the evidence in holding that petitioner did not seek medical aid until 44 days after the injury. Petitioner testified that he went to the U. S. Public Health Clinic at Milwaukee about one week after the injury (108); he saw Dr. Hanson there (110), who told him he had a bad bruise and to put hot applications on the leg, and gave him some pills (110). Respondent's witness, Dr. Grottier, from the U. S. Public Health Clinic at Milwaukee, Testified that there was no record of petitioner having been there. Respondent impeached its own witness in its brief filed in the Circuit Court (p. 8) by stating that "evidently libelant did go to Milwaukee to see the Marine doctor, who prescribed pills." Dr. Hanson did not testify and no excuse was made for his not testifying.

The decision below was in conflict with the Supreme Court and the 1st and 6th Circuits in that it erred

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a seaman of his maintenance and cure because he did not use "reasonable diligence", whereas the law is well settled that a seaman can be deprived of his maintenance only if he is guilty of gross negligence leading to his injury. The very foundation of Admiralty Law is based upon the doctrine of maintenance and cure; with little respect for the law; the Circuit Court failed to find that petitioner was grossly negligent;

> "While Maritime Law imposes a duty upon the owners of vessels to care for a seaman who falls sick or is injured in the service of his ship to the extent of his maintenance and cure...(The Osceola, 189 U. S. 158), in order to recover, an injured seaman must have acted without gross negligence or misconduct, and his own wilful wrongdoing gives him no rights against the vessel...(The U.S. Berwindglen, 68 F. 2d 125). Jackson v. Pittsburgh S. S. Co., 161 F. 2d. 866 @ 869. "So broad is the shipowner's obligation (to furnish maintenance and cure), that negligence for acts short of culpable misconduct on the seaman's part will not relieve him of the responsibility." Peterson V. The Chandos, 4 F. 445...Conceptions of contributory negligence, the fellow servant doctrine and assumption of risk have no place in the liability or defense against it. Only some wilful misbehavior or deliverate act of indiscretion suffices to deprive the seaman of his protection. The Ben Flint, supra..."

> "Accordingly, with the combined object of encouraging marine commerce and assuring the well-being of seamen, maritime nations uniformly have imposed broad responsibilities for their health and safety upon the owners of ships. (Citing Harden v. Gordon, 2 Mason 541...). In this country these nations were reflected early, and have since been expanded, in legislation designed to secure the comfort and health of seamen aboard ship, (citing various statutes)...The statutes are uniform in evincing solicitude that the seamen shall have at hand the barest essentials for exist-

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ence. They do this in two ways. One is by recognizing the shipowner's duty to supply them, the other by providing for care at public expense. The former do not create the duty, that existed long before the statutes were adopted...(citations) The provisions for public assistance were not intended to relieve the shipowner of his duty. On the contrary, their purpose was to make sure the seaman would have care, if the employer should fail to give it..." Aguilar v. Standard Oil, 318 U.S. 724, 730.

"The standard prescribed is not negligence but wilful misbehavior. In the maritime law it has long been held that while fault of the seaman will forfeit the right to maintenance and cure, it must be "some positively vicious conduct--such as gross negligence or wilful disobedience of orders." The Chandos (4 Fed. Rep. 545, 551 (1880, D. Ore.)), 2 Savy. 544, 549--550; The City of Carlisle, 39 F. 807, 815; The Ben Flint, (Fed. Cas. No. 1299 (1867, D. Mass.)), 1 Biss. 502, 506. And see Reed, vs. Canfield, (Fed. Cas. No. 11, 641 (1832, D. Mass.)); 1 Sumn. 195, 206. In Aguilar v. Standard Oil Co., 318 U. S. 724, 731, (1943 A.M.C. 451, 457), we stated the rule as follows: "Conceptions of contributory negligence, the fellow-servant doctrine, and assumption of risk have no place in the liability or defense against it. Only some wilful misbehavior or deliverate act of indiscretion suffices to deprive the seaman of his protection". Warren v. U. S., 340 U. S. 523.

"It has been the merit of the seaman's right to maintenance and cure that it is so inclusive as to be relatively simple, and can be understood and administered without technical considerations. It has few exceptions or conditions to stir contentions, cause delays, and invite litigations. The seaman could forfeit the right only by conduct whose wrongful quality even simple men of the sailing world recognize--insubordinations, disobedience to orders, and gross misconduct. On the other hand, the master knew he must maintain and care for even the erring and careless seaman, much as a parent would a child. For any purpose to introduce a gradation of rights and duties based on some relative proximity of the activity at time of injury to the 'employment' or the 'service of the ship,' would alter the basis and be out of harmony with the spirit and function of the doctrine and would open the door to the litigation which has made the seaman's remedy so often a promise to the ear to be broken

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to the hope." Ferrell v. United States, 338 U.S. 511, 516, 1949 AMC 613, 617.

The decision of the Circuit Court is in conflict with the decision of the Supreme Court in holding that petitioner was the result of the "obvious and well-known risks of the business", which is another way of saying "assumption of risk".

In construing a statute "enacted for the safety of employees", the Fed. Empl. Lia. Act., Sec. 54, the Supreme Court, in referring to the Boiler Inspection Act, said:

> "The act, like the Safety Appliance Act, is to be liberally construed in the light of its prime purpose, the protection of the employees and others by requiring the use of safe equipment."

The Supreme Court discussed a Compress Commission rule in arriving at its decision, said rule requiring: "Top of tender...shall be kept clean, and means provided to carry off waste water", and held:

> "...we think it was aimed at requiring the top of the tender to be kept free of foreign matter which would render footing insecure, for example...waste water..."--"In using the word 'clean', the Commission must have meant something more than the mere matter of construction. That something more is the continuing duty of promoting the safety of employees by removing from the top of the tender all extraneous substances which might make standing there hazardous."

> "Since petitioner's injuries were the result of respondent's violation of the Boiler Inspection Act, the partial defense of contributory negligence and the bar of assumption of risk are not available to the respondent." Lilly v. Grand Trunk Ry. Co., 317 U. S. 481, appeal from the 7th Cir.

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The decision of the Circuit Court is in conflict with the law of the State of Illinois, and is clearly against the preponderance of the evidence in holding that there is no showing of a causal connection between petitioner's injury aboard the vessel and his subsequent injuries. Dr. Carnesale, the Veterans Administration doctor who was petitioner's attending physician, at Wood, Wisconsin, and who knew more about petitioner's physical condition than any other person, testified that there was a causal connection between the injury aboard ship and the subsequent injuries (28 and 29), and he gave his reasons for his opinion, (30-32). Respondent, taking advantage of the medical examination rules on discovery, had petitioner examined by its own doctor, and said doctor did not testify.

The decision is in conflict with the law of the State of Illinois, in that the State Appellate Courts have upheld verdicts and judgments finding that there is a causal connection between various injuries following a fracture of a patella, or kneecap:

> "The plaintiff suffered a fracture of the patella of the right leg; while walking along a sidewalk his right leg slipped and his right leg doubled under him, fracturing the patella in the same place; testimony of experts was conflicting as to the proximate cause of the second injury. The jury found proximate cause between the injuries. Affirmed on appeal, Devlin v. Chgo. City Ry., 210 Ill. App. 7.
>
> "On March 5, 1917, as she was starting to come downstairs in her home, and she had stepped from one stair to another... her leg 'crumpled' or gave way under her

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and it was found that the jar had again broken..." "The jury found in answer to a special question that the second break was the result of the assistant without intervention of any negligence on her part..." HELD: "We are of the opinion that this finding was not unwarranted, Wilder v. General, 122 F. 2d 518.

The decision below is in conflict with the decision of the Supreme Court in that it failed to consider on petitioner's point on appeal that the District Court erred in failing to order the production of respondent's medical records and witness statements on motion, being duly made prior to trial:

"The protective cloak of this (attorney and client) privilege does not extend to information which an attorney secures from witnesses while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writing prepared by counsel for his own use in prosecuting his client's case..." Hickman v. Taylor, 329 U. S. 495 & 508; Kellogher v. U. S. 88 F. 2. 130.

The Circuit Court refused to rule on petitioner's point on appeal that the failure of the respondent to produce testimony, that was available to it, mitigated against the respondent and raised the presumption that said evidence would be unfavorable to said respondent:

"The failure to bring before the tribunal some... witness...serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the...witness, if brought, would have an open facts unfavorable to the party." Wigmore on Evidence, Sec. 285; Tepper v. Camps, 39 Ill. App. 494; Butterberry v. U. S. 103 F. 2d 483; Brown v. Maryland, 26 F. 2d. 130.

The respondent failed to bring in the doctor at Milwaukee who examined petitioner about a week after his injury; it failed to bring in the records from Milwaukee;

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it failed to bring in the medical record of petitioner made prior to his embarkation on enemy duty; it failed to bring in the doctor who examined petitioner prior to trial under the Federal Rules for discovery.

The decision below is contrary to the decisions in the Circuits in that it allowed a cross-appeal when no exceptions were taken in the lower court:

Anderson v. Alaska S. S. Co., 22 F. 2d. 832 @ 836.
Pasuchem v. Palapala, 127 F. 980 @ 988.
Templeton v. Peares, 10 F. [illegible] 898.
L. Shore v. White, 252 F. 788.
Wight v. Rankin, 221 F.
A/S J. Ludwig v. Ascimanto, 139 F. 2d. 144.
Wasatch M. Co. v. Crescent M. Co., 220 U.S. 538.

The decision below is contrary to the decision in the 9th Circuit in that it allowed certain depositions to be made a part of appendent's cross-appeal, even though they were not designated in respondent's designation of record on cross-appeal:

"Appellant's.../contention that Darnell was contributorily negligent, is not properly presented for review, in that the court's charges...and the evidence are not included in the record." Sanford v. Gagnon, 200 F. 2d. 830, 835.

In accordance with Rule 16 of the Rules of the Supreme Court of the United States, your petitioner objects to the admissibility of the respondent's depositions in the record as evidence. Said objection was made in the Circuit Court, and this record does not contain any order admitting them. The order of the District Court was entered on motion, without notice to the greater for petitioner, after the record was in the Circuit Court.

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CONCLUSION AND PRAYER

WHEREFORE, your petitioner respectfully prays that a writ of certiori be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, commanding said court to certify and send to this court on a day to be designated, a full and complete transcript of the record and all of the proceedings of said Circuit Court had in this cause, to the end that this cause may be reviewed and determined by this Court.

It was inevitable that the time would come when the conditions that exist in the U. S. District Court for the Northern District of Illinois, Eastern Division, and in the Circuit Court of Appeals for the Seventh Circuit should come to the attention of the court of last resort, the United States Supreme Court, and apparently this is the case. The conduct of the trial court has been briefly covered.

The decision of Judge Finnegan in the Mullen case, cited herein, found against the seaman, because it was his duty as deckhand to secure the vessel prior to a storm. This same Judge Finnegan wrote the decision in this case now before this court and reversed himself and found it the duty of a cook to secure the vessel. The decision of the Circuit Court is excused by the inexperience of Judge Finnegan. Judge Finnegan was elevated from the Cook County bench to the Circuit Court of Appeals; he had no experience with Admiralty cases in his private practice

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none while sitting on the county bench, and only two or three cases while on the Circuit bench. The first paragraph of the original opinion indicated that he did not know that this case was an Admiralty case filed under the Suits In Admiralty Act. After a petition for rehearing was filed, he was forced to admit his mistake and file an amended opinion, wherein he again committed error in stating that petitioner was suing for "wages, maintenance and cure as provided in the Jones Act". It is common knowledge that the Jones Act gives to the seaman the right to sue his employer for personal injuries arising out of his employer's negligence and grants him a jury trial. Maintenance and cure is still an Admiralty action and not one under the Jones Act. These same proctors, Seago, Pippen, Bradley and Vetter, who represented the respondent, and all its various departments in the lower courts, stated in a brief filed in the Supreme Court in opposition to a petition for writ of certiorari in the case of Miller v. Standard Oil, October Term, 1952, case #388:

> "That seamen are wards of the admiralty court as to maintenance and cure is conceded by petitioner. In an admiralty case such as this, an award of maintenance and cure rests in the sound discretion of the admiralty court as to its ward. To give such determination to a jury would amount to making the seaman a ward of twelve jurors not versed or skilled in such matters and would breach the relationship of the admiralty court as fiduciary or trustee and the seaman as its ward." Page 4 of said brief.

Said proctors were solicitous of the relationship of the guardian and its ward in the Miller case, because they did not want him to have a jury trial on a complaint for

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maintenance and cure. Judge Finnegan would now give to petitioner the right to a jury trial, as allowed by the Jones Act, in a claim for maintenance and cure.

The Court is apparently unaware that there are special rules of law and practice and procedure in admiralty cases. It made this case one under the Jones Act, then under the Suits in Admiralty Act, and under the Jones Act; said changes being made without regard to the effect that said special rules of practice and law might have upon the opinion rendered.

The Circuit Court inherited a spilled egg from the District Court and cannot find a way to make it fresh again. Can there ever be a case more deserving of the exercise of this Court's power of supervision? I think not.

If seamen do not receive the protection that they rightfully deserve, men will refuse to follow the sea for a livelihood. The United States has progressed and prospered by reason of its seafaring men in its commerce and in its defense. The procters for the respondent in their zeal to win a case, would tear down generations of work writing and interpreting laws for the benefit of seamen and the nation. Thorvald Nygaholt has served his country in two wars as the navy he is an old man. I am a young man. We respectfully urge that the seafaring man be not abandoned when he is no longer needed by the United States, which would now disown him. The time must never come when the state will be placed before the individual.

Respectfully submitted,

U.S.A.
RAG CONTENT

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Marion Hannigan,

J. J. Buckley,
Of Counsel

Robert P. Doyle,
Proctor for Petitioner

STATE OF ILLINOIS)
COUNTY OF C O O K) ss

ROBERT P. DOYLE, being first duly sworn upon his oath deposes and says that he has read the aforesaid Petition for Writ of Certiorari and Brief in support thereof, and the same is true in substance and in fact.

Robert P. Doyle

SUBSCRIBED and sworn to
before me this 14 day
of October, 1953.

Mary McCrohan
Notary Public

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